



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

May 22, 1957

Honorable Fred F. Holub
County Attorney
Matagorda County
Bay City, Texas

Opinion No. WW-125

Re: Authority of County to reimburse Pipe Line Company for expenses incurred by virtue of acquiring right of way where there is a pre-existing pipe line.

Dear Sir:

The following question was presented in your recent letter:

"The question that is presented here is that when the State Highway Commission takes over an existing County Road for the purpose of constructing a F.M. Highway and requests additional rights of way to be purchased by the County for a wider right of way than originally included in the County road right of way, and said old County road is crossed by a pipe line of a common carrier, must the County pay said common carrier for meeting State specifications in lowering and additional casing of the pipe line under the widened portion of said right of way?"

In your letter you also offered the following comment:

"It would appear, taking into consideration Article 6022 and 2351 that although the common carrier would have the right to cross a public road, where same is a County road under Article 2351, the Commissioners Court in its exercise of general control could control the method of

crossing and the location of crossing. Here in this case, had the common carrier made a formal notice of crossing, the Commissioners Court, could, it would be reasonable to assume, foresee a future widening of said road and require the crossing to provide for future widening. As it appears that no formal approval or notice of crossing was procured by the common carrier, it would appear that now any additional casing or lowering should be done at the expense of the common carrier."

We refer you to Opinions WW-45 and WW-78 (which are enclosed) holding, in effect, that the expenses for relocation of a utility on right of way already subject to public use, must be borne by the utility rather than the public. However, your question as presented was limited to the proposition of whether or not reimbursement was required to be paid to the pipe line common carrier for meeting State specifications in lowering and additional casing of the pipe line under the new or additional right of way required for the widening program. Attorney General Opinion No. 0-2405A, dated October 9, 1940, which you mentioned you had in your files, states as to the measure of damage in a similar case:

"Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under and across public roads, and where the county requires the additional right of way for new highways or public roads over and across the private property of the above mentioned corporation, the county would be liable to said corporation for the expense of casing said lines and burying them at a proper depth. . . ." (Emphasis added).

In City of Denton v. Chastain, Civ. App. 1941, NWH, 156 S.W. 2d 554, the court held:

"It has long been the rule in this state that if by the taking of a portion of one's land for public use it becomes necessary to build fences, construct gates, culverts and other things necessary to make the remainder usable and to prevent greater losses sustained by the

appropriation of that part taken, evidence of such expenses thus incurred should be considered by the jury in fixing the amount of damages to that part not appropriated. . . ."

Also, see Pillot v. City of Houston, Civ. App., 1932, NWH, 51 S.W. 2d 794.

Should this right of way have to be condemned, the cost of burying and providing additional casing would not be a separate issue, but should be considered in the general issues of the before and after values of condemnee's property. If, however, this right is acquired by out of court settlement, it seems that there would be no other way to compute what the pipe line company is entitled to but by considering the cost of reburying and providing additional casing, and it is considered that this is supported by ample authority as above set forth.

You pointed out, as above quoted, that you considered this situation different because the pipe line utility had not secured permission of the Commissioners' Court to cross the existing road and that "it would be reasonable to assume" that the Commissioners' Court would "foresee a future widening of said roads and require the crossing to provide for future widening. . . ." and for that reason there should be no liability for reburying and providing additional casing on the portion taken for new or additional right of way.

It is submitted that this proposition has been decided adversely to your contention in Hammon v. Wichita County, Civ. App., 1956, 290 S.W. 2d 545 (no writ history):

"Wichita County has no right to destroy appellant's property prior to the lawful appropriation thereof by paying or securing the payment of compensation. City of Fort Worth v. Dietert, Tex. Civ. App., 271 S.W. 2d 299, error refused.

"Conversely, the County has no right to restrain appellant from making lawful use of his property prior to a legal taking thereof by the County."

Hence, assuming, without deciding, that the statutes impose upon the pipe line common carrier the duty of clearing with the Commissioners' Court before crossing a county road,

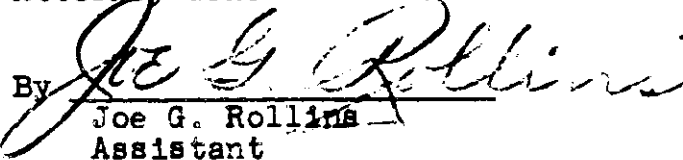
and even assuming that the Commissioners' Court has foreseen the widening, it could not have required the pipe line common carrier to make special preparations, at additional expense, on land not in the then existing right of way as such would have been a restraint upon the use of private property prior to a legal taking thereof.

SUMMARY

Where a pipe line crosses under an existing county road, which road is desired by the State as a Farm to Market road, and additional right of way is required to widen the road, the governmental authority securing this additional right of way is authorized to pay the pipe line common carrier for expenses incurred in meeting state specifications which specifications require the lowering of the pipe line and additional casing therefor under the widened, or newly acquired, right of way.

Yours very truly,

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By 
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Assistant

APPROVED:

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REVIEWED FOR THE ATTORNEY
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